too, the Court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law."

From the record, I am satisfied that there has been a misconception of the law and that this has been responsible for the Board's decision in issuing the Certificate. Therefore, in my judgment, an appeal lies to this Court.

We now come to the second question: Can the Court interfere with the Certificate of the Board?

In his submission, Mr. Lim stated that "public interest" was not pleaded and there was no mention of it at all by the applicant/respondent in his evidence. It was, according to the applicant/respondent himself, in his own interest to rebuild.

Mr. Yeo, in reply, referred to section 12(1)(m) of the Control of Rent Ordinance, 1956, which is as follows:—

"12. (1) No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely—

(m) where the President or Chairman of the Board has certified that the Board is satisfied that the owner of the premises intends to demolish them for the purpose of rebuilding and in its opinion it is in the public interest that he should be permitted so to do:

Provided that an order or judgment shall not be made or given under this paragraph unless the Court is satisfied that the owner of the premises has complied with any order or conditions which the Board may have seen fit to make or impose;"

He also quoted the case of *Low Yeo Foong & Ors. v. Chop Thong Cheong*[2]. That was a suit before the Court praying for an order of ejectment, and Buhagiar, J. held that the Court could not interfere with the Certificate of the Rent Assessment Board which was final and binding. In my view, the present case is distinguishable from the case I have just mentioned above, as in that case the Certificate of the Board was not challenged in that there was no appeal against it whereas here it is an appeal against the Certificate of the Board.

Now, section 12(1)(m) of the Control of Rent Ordinance, 1956, confers a discretion on the Rent Assessment Board both as regards the intention of the owner of premises to demolish the premises for the purpose of rebuilding and as its being in the public interest that he should be permitted to do so, but such discretion, in my opinion, must be exercised judicially.

It is quite clear from the record that before he was served with the notice to abate nuisance, the landlord never intended to demolish and rebuild the premises. He only made up his mind to do so apparently after the tenant had refused to carry out the repairs (see evidence of the tenant on page 7 of the record) and after ascertaining what it would cost him to carry out the repairs, and what it would cost him to demolish and rebuild, and finding that it would be to his advantage to do the latter. He admitted this before the Board when he said "it would be better for me to build a new premises."

Before issuing the Certificate, the Board visited the premises and came to the conclusion that the building was in a state of bad repair and that the locality, being in the central town area, would be improved by the construction of a new building and, therefore, in its opinion it was in the public interest that the applicant/respondent be permitted to demolish the premises and rebuild.

From a careful study of the evidence before the Board, I am led to the conclusion that it was for the applicant/respondent's personal benefit and not in the public interest that the premises was to be demolished and rebuilt. That being so, to my mind, it could not be said that the Board had exercised its discretion judicially.

I would, therefore, allow the appeal with costs.

Appeal allowed.

Solicitors: *Lim, Lim & Oon; A. S. Yeo.*

PUBLIC PROSECUTOR v. CHOY KOK KUAN & ORS.

[C.A. (Thomson C.J., Smith and Ong JJ.)
November 3, 1958]

[K.L. — F.M. Criminal Reference No. 2 of 1958]

Election — Use of motor vehicle for purposes of carrying electors to or from polls — Whether failure to register motor vehicle with Returning Officer an offence under reg.3 or reg.5 of the Legislative Council Elections (Control of Motor Vehicles) Regulations, 1955.

Criminal Law and Procedure — Charge — Breach of permissive conditions — No offence.

Courts Ordinance, 1948, s.34 — Object of — Observations on.

Regulation 3 of the Legislative Council Elections (Control of Motor Vehicles) Regulations, 1955, provides that a person shall not with a view to supporting or opposing the candidature of any individual as against any other individual use any motor vehicle for the purpose of the conveyance of electors to or from the poll. An exception to this prohibition is contained in reg. 4(b) which provides that nothing shall prevent a candidate at an election or some person on his behalf using the candidate's own private motor vehicle or a borrowed private motor vehicle to convey voters to or from the poll

if the conditions mentioned in reg. 5 are complied with. One of the conditions is that the vehicle shall be registered with the Returning Officer. In this case the defendants were severally charged with using private motor cars which had not been registered with the Returning Officer for the conveyance of electors and that they thereby "committed a breach of the conditions of reg. 5(a) of the Legislative Council Elections (Control of Motor Vehicles) Regulations, 1955." A sanction for the prosecution was given by the Deputy Public Prosecutor. At the trial it was submitted that the sanction was not a valid sanction and the learned Magistrate agreed with this submission and discharged the defendants. The matter came to the notice of a Judge who called for the record and decided to exercise his powers of revision. After hearing argument he decided that the sanction in the case was sufficient. He also gave a certificate under section 34 of the Courts Ordinance, 1948 for the case to be heard by the Court of Appeal.

Held: (1) it is not an offence to fail to comply with any of the conditions set out in reg. 5 of the Legislative Council Elections (Control of Motor Vehicles) Regulations, 1955;

(2) the offence to use a motor vehicle is in contravention of reg. 3 as it is that regulation alone that contains any prohibition of the use of motor vehicles;

(3) the question as to whether the sanction was valid or not did not therefore arise as it was a sanction to institute a prosecution for something which is not an offence.

[**Editorial Note:** A similar point to that decided in this case arose in the case of *Tonkin v. Raven* (1958) 3 All E.R. 374; (1958) 3 W.L.R. 643, the report of which was not available to the Court when the above reference was heard. In that case section 47 of the Shops Act, 1950 required every shop, save as otherwise provided, to be closed for the serving of customers on Sunday. By section 50 of the Act and the Shops Regulations, 1937, where several traders or businesses are carried on in the same shop and the trade or business consists only of certain transactions, the shop is entitled to remain open on Sunday subject to certain conditions which include the exhibition of notices. In that case the respondent had been charged with failure to comply with the provisions of section 50 of the Shops Act, 1950 in that notices were not displayed as required thereby. It was held that section 50 of the Shops Act was a permissive enactment which did not create an offence but an exemption to section 47 which alone created the offence.]

Cases referred to:—

(1) *Yusofalli Mulla Noorbhoy v. R.*, 76 I.A. 158.

(2) *Gokulchand Dwarkadas Morarka v. R.*, 75 I.A. 30.

(3) *Lyn Hong Yap v. Public Prosecutor* (1956) M.L.J. 226.

(4) *Tindall v. Wright*, 27 Cox C.C. 212.

COURT OF APPEAL, Criminal Reference from Ipoh.

Mohd. Salleh bin Abas (Federal Counsel) for the appellant.

S. P. Seenivasagam for the respondents.

Cur. Adv. Vult.

Thomson C.J.: This reference under section 34 of the Courts Ordinance seeks to raise the question as to what constitutes sufficient compliance with the provisions of Regulation 10 of the Legislative Council Elections (Control of Motor Vehicles) Regulations, 1955. These Regulations contain a number of provisions relating to the use of motor vehicles at Legislative Council Elections. Regulation 9 provides that any person who commits a breach of, or fails to comply with, any of the provisions of the Regulations shall be guilty of an offence and liable on conviction to a fine not exceeding $500 and Regulation 10 reads as follows:—

"A prosecution for an offence against these Regulations shall not be instituted without the sanction of the Public Prosecutor."

Presumably Regulation 10 was enacted by reason of the fact that offences under the Regulations are to be deemed to be illegal practices for the purposes of the Election Offences Ordinance, 1954, and a conviction for such an offence could thus provide the foundation for an election petition.

On 23rd November, 1957, a bye-election for the Legislative Council was held at Ipoh and it was apparently thought that in connection with this bye-election offences under the Legislative Council Elections (Control of Motor Vehicles) Regulations had been committed by four persons who were the respondents to the present proceedings and were the defendants in Ipoh Magistrate's Court Summons Cases Nos. PC 640 of 1958, 639 of 1958 and 641 of 1958. For the sake of simplicity we propose to deal in detail only with the case of the respondents Choy Kok Kuan and Yau Chang Sze who were the defendants in Case No. PC 640 of 1958.

On 7th April, 1958, a Police Officer applied to the Ipoh Magistrate for a summons against these two respondents. He produced a signed complaint and with it he produced a document in the following terms signed by a Deputy Public Prosecutor:—

"The Legislative Council Elections
(Control of Motor Vehicles) Regulations, 1955.
(F.M.L.N. No. 305/55)

In exercise of the powers conferred upon the Public Prosecutor under Regulation 10 of the Legislative Council Elections (Control of Motor Vehicles) Regulations, 1955, I, Abdul Kadir bin Yusuf, Deputy Public Prosecutor, in the State of Perak, hereby sanction the prosecution of (1) Choy Kok Kuan and (2) Yau Chang Sze for a breach of the condition of Regulation 5(a) and punishable under Regulation 9(2) of the aforesaid Regulations,

alleged to have been committed at Ipoh on the 23rd day of November, 1957.

Dated at Ipoh this 15th day of March, 1958."

At this stage the Magistrate would seem to have had no doubts as to the propriety of the proceedings and a charge was framed and a summons issued in the following terms:—

"That you on the 23rd day of November, 1957 at Ipoh, on behalf of Mr. D R. Seenivasagam, a candidate at the Federal Legislative Council Bye-Election held at Ipoh, did use a private motor car No. AB 5298 which had not been registered with the Returning Officer for the conveyance of electors to and from the Polling Station at Tiger Lane, Ipoh, and that you thereby committed a breach of the conditions of Regulation 5(a) of the Legislative Council Elections (Control of Motor Vehicles) Regulations, 1955 (L.N. No. 305/55) and punishable under Regulation 9(2) of the said Regulations."

Now, it is to be observed that this charge was defective. Its defects might have been cured by amendment at a later stage but as it stood it was defective.

Regulation 3 provides that a person shall not with a view to supporting or opposing the candidature of any individual as against any other individual use any motor vehicle for the purpose of conveyance of electors to or from the poll. An exception to this prohibition is contained in Regulation 4(b) which provides that nothing shall prevent a candidate at an election or some person on his behalf using the candidate's own private motor vehicle or a borrowed private motor vehicle to convey voters to or from the poll if the conditions mentioned in Regulation 5 are complied with and these conditions are set out in Regulation 5 and amplified in Regulation 6. One of these conditions is that the vehicle shall be registered with the Returning Officer and there shall be displayed on it a placard supplied by the Returning Officer indicating that it is so registered.

In our view it is abundantly clear that it is not an offence to fail to comply with any of the conditions set out in Regulation 5. The offence is to use a motor vehicle in contravention of Regulation 3 for it is Regulation 3 alone that contains any prohibition of the use of motor vehicles. Moreover it is well settled that in a charge for a statutory offence it is not necessary to negative any exception or exemption from the offence contained in the statute itself or otherwise. In the present case, accordingly, it was not for the prosecution to allege that the case did not fall within the exceptions contained in Regulations 4 and 5. It was for the prosecution to allege that Regulation 3 had been contravened and it would then have been open for the defence at the trial to attempt to bring the case within the exceptions.

If the case had been tried out and if, with or without amendment of the charge, the defendants had been convicted for an offence in contravention of Regulation 3, it may be that the conviction if justified by the evidence would have stood by reason of section 156 of the Criminal Procedure Code.

But the case was not tried out.

The defendants claimed trial and before any evidence was called their counsel submitted that the sanction which had been given by the Deputy Public Prosecutor was not a valid sanction because it did not set out on the face of it the facts on which the defendants were to be charged. The learned Magistrate (who was the same Magistrate as had originally issued the summons) agreed with this submission of counsel and discharged the defendants.

At this stage there were two courses open to the Deputy Public Prosecutor if he was dissatisfied with the Magistrate's decision. In the first place he could have appealed against it. In the second place he could have drawn up a fresh sanction to which the objections raised to the original sanction could not have been raised and proceeded with a fresh prosecution (see *Yusofalli Mulla Noorbhoy v. The King* [1]).

The Deputy Public Prosecutor did not in fact take any steps to pursue either of the remedies thus open to him, but the matter came to the notice of a Judge who called for the record and decided to exercise his powers of revision. After hearing argument he decided that the sanction in the case was sufficient. He accordingly set aside the Magistrate's order discharging the defendants and remitted the case to the Magistrate's Court "with directions to take cognisance" of it. The same day he gave a certificate under section 34 of the Courts Ordinance and accordingly the matter has come before us and has to be treated as the re-hearing of an appeal against the Magistrate's decision by the Public Prosecutor.

The terms of section 34 of the Courts Ordinance are unfortunate. The object of the section is clearly to afford a limited right of appeal from a Judge exercising his appellate jurisdiction in cases where an important point of law is involved. Instead, however, of providing for some sort of appeal by way of case stated the section provides that the original appeal as a whole shall be re-heard by the Court of Appeal and as the matters in question are criminal

circumstances can arise where the appeal has to be dealt with in a particular way irrespective of the views of the Court on the question of law on which its decision is really sought.

That position has arisen here.

It is now well settled that all these sanction cases have to be considered in the light of the case of *Gokulchand Dwarkadas Morarka v. The King.* (2) It is also settled that in this country what was said in *Morarka's* case has to some extent to be read in the light of the differences which exist between the Indian Code of Criminal Procedure and our own Code (see *Lyn Hong Yap v. Public Prosecutor* (3)). In the present case the Magistrate was of the opinion that thus viewed the sanction was bad. The Judge was of the opinion that thus viewed the sanction was good.

With great respect to everybody concerned we do not think the question arises. Or rather if it does arise it arises in a purely hypothetical and academic way for whether the sanction be good or bad it was a sanction to institute a prosecution for something which is not an offence and whether or not the learned Magistrate's view as to the validity of the sanction was correct it is clear that his decision to discharge the defendants was correct and we would not be justified in interfering with it.

We would add that the course we have taken is similar to that taken by the Divisional Court in the case of *Tindall v. Wright.* (4) That was an appeal by way of case stated which raised two distinct questions. Counsel for the appellant conceded that the first question was concluded against him by a previous decision of the Court but stated that both parties desired a decision on the second question. The Court declined to consider the question and Lord Hewart, C.J., observed (at p. 217) that if they were to enter upon the problem "however attractive it may be":—

"We should be offering a decision, at the request of the parties, which would be essentially in the nature of an *obiter dictum* and would not be binding upon any other court..... No doubt it does seem a little flaw on the first view of the matters in which the parties upon the one side and upon the other side desire that a particular problem should be solved — although the case from which it arises is disposed of in another way — that this court should refrain from entering on the inquiry and giving a decision. But.....the decision so given might easily lead not to enlightenment but to embarrassment for those who have to consider a similar problem afterwards."

Reference answered.

Solicitors: *S. Seenivasagam & Sons.*

LIEW KWEE SAM v. YAP SEOW LOONG & ORS.

[O.C.J. (Smith J.) November 27, 1958]

[Seremban — Civil Suit No. 55 of 1951]

Partnership — Licensed rubber dealers business — Whether all partners required to be licensed as rubber dealers.

Rubber Supervision Enactment, 1937 (F.M.S.) ss. 5(i) and 17(i) — Principal object of the Enactment.

Interpretation — Revenue law — Breach of.

This was a claim by the plaintiff against the alleged partners of a rubber dealers' business for the sum of $5,097.42 due on an account for rubber sold and delivered to the alleged firm.

The first and third defendants had submitted to judgment. The fourth defendant was out of the jurisdiction and unserved. The second defendant contested his liability.

The basic facts of the case were not in dispute. The first defendant before the war was a rubber dealer in Seremban carrying on business under the style of Tong Seng Rubber Co. He started up his business again at the end of 1945 still under the style of Tong Seng Rubber Co. and took out a rubber dealer's licence for himself alone trading as Tong Seng Rubber Co. On January 14, 1946 he took in eight other partners. These partners were, in accordance with the terms of the partnership agreement, sleeping partners. The sole management of the business was to be in the hands of the first defendant and the rubber dealer's licence was to be in his name and his alone. Accordingly when it became necessary to apply for renewal of the rubber dealer's licence the first defendant applied in his own name indicating that he was trading as the Tong Seng Rubber Co., but did not disclose the fact that he had eight sleeping partners. This state of affairs continued down to 1951. Throughout all this period the plaintiff had been selling his rubber to the Tong Seng Rubber Co. The plaintiff said that he was aware that the first defendant had a rubber dealer's licence but that he did not know and took no steps to ascertain whether any of his partners' names were included in the licence. He was aware that there were other partners, and had met the second defendant on the premises of the first defendant, and the second defendant had said that he was a partner. The plaintiff said he knew that the first defendant was licensed and considered that the first defendant represented all the partners. He also said, and it was not denied, that the second defendant did not tell him that he was retiring from the partnership.

From time to time various members of the partnership withdrew therefrom and on June 11, 1951 the second defendant also withdrew. He did not give notice of his withdrawal to the plaintiff. The last dealing of the plaintiff with the Tong Seng Rubber Co. was on June 13, 1951 when he delivered some rubber and scrap.

Under section 5 of the Rubber Supervision Enactment all persons purchasing rubber must be licensed, and section 17(i) of the same Enactment provides that when two or more persons are in partnership it is not neces-